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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

NORRIS BRUCE CARTER,

Defendant and Appellant.

A124186

(Lake County Super. Ct.
Nos. CR902644, CR903237)

Defendant Norris Bruce Carter appeals the revocation of his probation in two cases, claiming the trial court abused its discretion when it imposed middle term sentences rather than lower term sentences for two felony convictions. As discussed below, we conclude the court acted within its proper discretion and affirm.

BACKGROUND

On May 27, 2005, Carter pleaded guilty to two counts in case No. CR903237: a felony violation of Health and Safety Code section 11350, subdivision (a) (possession of cocaine and hydrocodone), and a misdemeanor violation of Vehicle Code section 14601.2, subdivision (a) (driving with a suspended license for driving under the influence). On that date, he also pleaded guilty to a felony violation of Penal Code section 666 (petty theft with prior prison term for theft-related offense) in case No. CR902644. On July 8, 2005, the trial court combined the two cases, suspended imposition of sentence and granted formal probation for three years.

On January 5, 2006, Carter's probation officer (PO) filed affidavits alleging a probation violation in both cases, for submitting a urine sample that tested positive for cocaine use. On February 17, 2006, Carter admitted the violation, and the trial court reinstated his probation one month later.

Carter's PO filed a second set of probation violation affidavits on June 14, 2006, alleging Carter had committed a felony violation of Penal Code section 245, subdivision (a)(1) (assault with a deadly weapon or force likely to produce great bodily injury), and had failed to appear for scheduled drug testing three times. On September 8, 2006, Carter admitted the alleged failure to drug test on two occasions. The trial court, on September 29, again reinstated Carter's probation. One of the modified conditions of the reinstated probation called for Carter to enroll with Lake County Alcohol and Other Drugs Services (AODS) within seven days, "for placement in residential treatment for a period of no less than six (6) months."

On March 13, 2007, the PO filed a third set of probation violation affidavits, alleging Carter had failed to contact AODS and enroll in residential treatment as required. On December 12, 2008, the trial court held a contested hearing on this alleged violation. A month later, on January 16, 2009, the court found that Carter had violated his probation. At the sentencing hearing, held February 20, 2009, the court denied reinstatement of probation, and imposed as the principal term a midterm sentence of two years in state prison for the felony violation of Penal Code section 666 in case No. CR902644. As a subordinate term, the court imposed a consecutive sentence for one-third of the midterm—eight months imprisonment—for the felony violation of Health and Safety Code section 11350, subdivision (a) in case No. CR903237. Concurrent to the subordinate term, the court further ordered a sentence of 180 days for the misdemeanor violation of Vehicle Code section 14601.2, subdivision (a) in case No. CR903237. This appeal followed. (Pen. Code, § 1237, subd. (b); *People v. Coleman* (1975) 13 Cal.3d 867, 871, fn. 1.)

DISCUSSION

When a judgment of imprisonment is to be imposed, and the statute specifies three possible terms, the court shall select the term that, in its discretion, best serves the interests of justice, and shall set forth on the record the reasons for imposing the term selected. (Pen. Code, § 1170, subd. (b); Cal. Rules of Court, rule 4.420(a) & (e); see Cal. Rules of Court, rules 4.420(b), 4.421, 4.423.)

Here, the trial court selected the middle term for each of Carter's two felony violations. The court noted that the circumstances of the two felonies were "arguably mitigated"—that is, Carter's petty theft involved property valued at \$30, and the amount of drugs found in his possession was "relatively small." Carter had not been arrested or convicted of any new crimes while on probation, other than his admission of drug use. On the other hand, the court noted factors in aggravation: Carter had a prior criminal record, his prior performance on summary probation had not been satisfactory, and in the court's view he had shown, despite multiple opportunities, that he was simply "not interested" in obtaining treatment for his substance abuse problem that had been the direct cause of his continuing probation violations. The court stated that it was selecting the midterm as to both felonies, "because the circumstances in aggravation and mitigation are an approximate balance."

Carter contends the trial court's selection of the middle term for his felony violations was an abuse of discretion, because "the particular circumstances of [his] life dictated a low term sentence." He urges that his crimes were relatively minor and nonviolent in nature, he acknowledged his guilt at an early stage in the proceedings, and he had not committed any new offenses. He also claims his prior criminal record was not an aggravating factor because these were misdemeanor convictions that were neither "numerous or of increasing seriousness." (See Cal. Rules of Court, rule 4.421(b)(2).)¹ Carter's position is that his failure to seek residential treatment and his prior criminal

¹ On this point, we observe only that we have reviewed Carter's prior criminal history as detailed in his initial probation report, and conclude that reasonable minds might well differ as to whether his offenses and prior probation violations were "numerous" or of "increasing seriousness."

history were not sufficient to “outweigh” the “minor nature” of his felony offenses and his predominantly “lawful conduct” on probation.

These objections have no merit. We review the trial court’s sentencing choice for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847 (*Sandoval*).) An abuse of discretion may consist of a failure to exercise discretion, or a reliance on circumstances that constitute an improper basis for decision. (*Id* at pp. 847-848.) The trial court must exercise its discretion in a manner not arbitrary or capricious, consistent with the letter and spirit of the law, and based on an individualized consideration of the offense, the offender, and the public interest. (*Id* at p. 847.) Stated another way, a trial court does *not* abuse its discretion in making a determinate sentence choice unless its decision is “so irrational and arbitrary that no reasonable person could agree with it.” (*People v. Carmony* (2004) 33 Cal.4th 367, 377 (*Carmony*).)

Our examination of the record indicates the trial court reviewed the probation report prepared for the hearing, as well as three earlier reports. Carter submitted no additional evidence. (See Cal. Rules of Court, rule 4.420(b).) In recounting the relevant facts detailed in the reports, it is clear to us the court carefully considered the individualized circumstances of the offenses, the offender, and public safety. The court stated as its reason for choosing the middle term the “approximate balance” it had found after weighing the various aggravating and mitigating factors.² It is not our role, as Carter suggests, to reweigh these factors—the reviewing court is neither authorized nor warranted in substituting its judgment for that of the trial court. (See *Carmony, supra*, 33 Cal.4th at p. 377.) We conclude that the court’s conclusion was by no means so irrational

² Under the former determinate sentencing law, a trial court was essentially required to select the middle term unless aggravating or mitigating circumstances dictated otherwise. (See former Pen. Code, § 1170, subd. (b), as amended by Stats. 2004, ch. 747, § 1, p. 4434.) The current law provides that the choice of the appropriate term shall be within the sound discretion of the court. (Pen. Code, § 1170, subd. (b).) As our Supreme Court recently observed, it is both accurate and realistic to recognize that the difference between these provisions is not, as a practical matter, a substantial one. (*Sandoval, supra*, 41 Cal.4th at p. 850.)

or arbitrary that no reasonable person could agree with it. There was no abuse of discretion.

DISPOSITION

The judgment is affirmed.

Marchiano, P.J.

We concur:

Dondero, J.

Banke, J.